

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LARRY JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

November 21, 1997

No. 195560

Recorder's Court

LC No. 94-012323

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. He was sentenced to ten to twenty years in prison as an habitual offender, MCL 769.12; MSA 28.1084. We affirm.

On November 4, 1994, at approximately 1:25 a.m., Officer Kevin Bias responded to a radio call regarding a breaking and entering at a Northville party store. While en route to investigate the call, Bias observed a gray Cadillac traveling in a direction opposite the scene of the crime. Bias believed that the Cadillac may have been involved in the robbery, as it was near the party store and there were no other cars on the road. Bias noticed that there was no license plate affixed to the rear of the vehicle and decided to stop the Cadillac. After stopping the car, he discovered that there was a temporary tag in the rear window. When Bias questioned defendant, who was driving the car, defendant told the officer that his name was Kerry Bernard Miles. Bias asked for defendant's license, but defendant could not produce any identification. As Bias was attempting to obtain additional information from defendant, Officer Garbarino arrived in response to Bias' call for back-up. Bias then arrested defendant for driving without an operator's license.

After arresting defendant, the officers called for a tow truck and began an inventory search of the car. During the search, Bias found a pair of vise grips, a pair of cotton gloves, adjustable channel lock pliers, a pipe wrench and a folding knife. Bias and Garbarino continued to search the trunk of the car after it had been towed to the security garage; this search turned up 68 1/2 cartons of cigarettes, two screwdrivers, one flashlight, and some garbage bags. Cigarettes had been stolen from the party store. Defendant was then charged with breaking and entering with intent to commit larceny. A jury found defendant guilty as charged.

Defendant's first argument on appeal is that the traffic stop which led to his arrest, the impoundment of his vehicle, and an inventory search of his car was not supported by probable cause. Defendant contends that all evidence derived from the search must be suppressed. We disagree. We review the trial court's decision to deny defendant's motion to suppress under a clearly erroneous standard, *People v Taylor*, 454 Mich 580, 595; 564 NW2d 24 (1997), and conclude that the officer's decision to stop and search defendant's vehicle was reasonable.

An investigatory stop may take place when the investigating officers have less than probable cause. *Adams v Williams*, 407 US 143, 145; 92 S Ct 1921; 32 L Ed 2d 612 (1972). The Supreme Court outlined the requirements for an investigatory stop of an automobile in *People v Whalen*, 390 Mich 672; 213 NW2d 116 (1973). In *Whalen, supra*, the Court noted that a stop and search of a moving motor vehicle is to be evaluated under a reasonableness test. *Id.* at 682. Reasonableness should be determined from the facts and circumstances of each case. *Id.* Fewer facts are necessary to support a finding of reasonableness when a motor vehicle is involved than when the search involves a house or home. *Id.* Furthermore, an investigatory stop of a motor vehicle may be based upon fewer foundational facts "than those necessary to support a finding of reasonableness where both a stop and a search is conducted by the police." *Id.* See also *People v Martin*, 99 Mich App 570, 576; 297 NW2d 718 (1980). The rules adopted by the Supreme Court must be applied on a case-by-case basis. *People v Lillis*, 64 Mich App 64; 235 NW2d 65 (1975).

Application of the rules set forth in *Whalen, supra*, to the present case lead us to conclude that the stop of defendant's vehicle was justified and reasonable under the circumstances. The arresting officer, Kevin Bias, testified that he stopped defendant because he did not see a valid license plate affixed to the rear of his car and because he wanted to see if the driver had been involved in the burglary he was en route to investigate. The initial stop was warranted on the basis of the missing license plate. *People v Burrell*, 417 Mich 439, 450; 339 NW2d 403 (1983).

We further note that the inventory search of defendant's vehicle was lawful.<sup>1</sup> The legality of an inventory search that follows an arrest depends in part on whether the vehicle to be searched is lawfully impounded. *People v Poole*, 199 Mich App 261, 265; 501 NW2d 265 (1993). The impoundment of a vehicle is lawful if done pursuant to police department policy. *Id.* An inventory search of an impounded vehicle is lawful if done pursuant to standardized criteria, policies or routines regulating how such searches are to be conducted. *Id.* In the present case, Bias testified that the inventory search of defendant's vehicle was conducted pursuant to department policy which requires that the entire contents of an impounded vehicle be recorded. Since the Northville Township Police Department had in place a policy for conducting inventory searches of impounded vehicles, and because the search of defendant's vehicle was conducted pursuant to this policy, the inventory search of defendant's vehicle was lawful and, therefore, the trial judge did not err in denying defendant's motion to suppress the evidence seized as a result of this search.

Defendant next argues that the trial court abused its discretion in admitting evidence of defendant's involvement in three other burglaries because the other acts were not sufficiently similar to the charged offense and because their probative value was significantly outweighed by the danger of unfair prejudice to defendant.<sup>2</sup> We review the trial court's decision to admit the evidence under an abuse of discretion standard, *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994),

and find that the evidence was appropriately considered, correctly admitted, and used for a legitimate purpose.

MRE 404(b), which governs the admission of evidence of other crimes, provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The Supreme Court addressed the admissibility of evidence of other acts under this rule in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), and limited the application of the four-part test set forth in *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982). In *Golochowicz*, *supra* at 309, the Court determined that:

Before evidence of the defendant's other misconduct may be admitted: (1) there must be substantial evidence that the defendant actually perpetrated the bad act sought to be introduced; (2) there must be some special quality or circumstance of the bad act tending to prove the defendant's identity or the motive, intent, absence of mistake or accident, scheme, plan or system in doing the act and . . . opportunity, preparation and knowledge; (3) one or more of these factors must be material to the determination of the defendant's guilt of the charged offense; and (4) the probative value of the evidence sought to be introduced must not be substantially outweighed by the danger of unfair prejudice.

In *VanderVliet*, *supra* at 65-66, the Court stated that “[t]he *Golochowicz* ‘test’ does not set the standard for the admissibility of other acts evidence.” *Id.* *Golochowicz* does, however, identify the requirements of logical relevance when the proponent is utilizing a *modus operandi* theory to prove identity. *Id.* Identity was a central issue in the present case, and the prosecution moved to admit the evidence under a *modus operandi* theory to prove that defendant was the perpetrator of the charged offense. Accordingly, the *Golochowicz* test is applicable to the present case.

After reviewing the record, this Court concludes that the elements of the *Golochowicz* “test” were satisfied and that the evidence was properly admitted. First, the prosecution presented the trial court with substantial evidence linking defendant to each of the crimes.<sup>3</sup> Second, the other acts evidence at issue includes three burglaries which bear striking similarities to the robbery at the Northville party store. In each instance, entry was gained in the same fashion; namely, the lock to the front door was completely removed. In each case, the burglar stole the same items, cigarettes and/or lottery tickets, using the same method – placing the items in a garbage can or plastic garbage bag. In each case, the burglar gained entry to the store, stole the cigarettes and/or lottery tickets, and left the premises in a matter of minutes. Third, we find that the probative value of this evidence substantially outweighed the danger of unfair prejudice to defendant. When used to prove identity of the accused, the probative value of other acts evidence is determined, in part, by the similarity of the “other acts” to

the charged act. *Golochowicz*, *supra* at 326. The possibility that the jury might have resorted to determining defendant's guilt solely on the basis of his character, the consequence MRE 404(b) seeks to avoid, was limited due to the similarities of the offenses. *Id.* Finally, the trial court's ruling indicates that it considered the relevance and prejudicial value of the other acts evidence the prosecution sought to admit and determined that only three of these acts were admissible. The court's ruling "demonstrates an effort to balance the evidence's probative value with its prejudicial effect." *People v Julian*, 171 Mich App 153, 158; 429 NW2d 615 (1988). Given the facts and circumstances of this case, we hold that the trial court did not abuse its discretion in permitting the introduction of this other acts evidence.

Defendant also argues that his sentence of ten to twenty years' imprisonment is disproportionate to the severity of the crime charged and constitutes an abuse of discretion by the trial judge. We disagree. Defendant was convicted of breaking and entering, MCL 750.110; MSA 28.305, and was sentenced as an habitual offender under MCL 769.12; MSA 28.1084. Pursuant to MCL 769.12; MSA 28.1084, a habitual offender convicted of this felony is subject to imprisonment for life or for a lesser term. Defendant's sentence falls within the range permitted by the statute. Moreover, the record indicates that the trial judge considered defendant's extensive prior criminal record, as well as the non-assaultive nature of the offenses, and that the court determined that defendant's record indicated his inability to "meet the standards required [of] him by our system." As the Supreme Court noted in *People v Hansford, (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997), a sentence within the statutory limits is not an abuse of discretion where the defendant's criminal history demonstrates that he is unable to conform his behavior to the dictates of the law. For these reasons, we find that defendant's sentence is not disproportionate.

Affirmed.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Peter D. O'Connell

<sup>1</sup> We also note that defendant was lawfully arrested. Defendant does not contest the fact that he was unable to produce identification or a valid driver's license. The name which defendant gave the officer, Carey Miles, did not match the name of the vehicle owner listed on the temporary registration. Thus, since Bias could not confirm the identity of the vehicle's owner or driver, the resulting arrest was lawful.

<sup>2</sup> At trial, the prosecution introduced evidence of only two, rather than three, other acts.

<sup>3</sup> The first robbery occurred at a party store in Jackson in May, 1994. A witness saw a car pulling away from the store and obtained the license plate number; the plate number and car were registered in the name of defendant's girlfriend. The woman told police that defendant had been using the car and that she had seen lottery tickets in the car. The second robbery took place at a convenience store in Blackman Township in May, 1995. Several clerks identified defendant from a photographic array as the person who redeemed several stolen lottery tickets. Defendant was arrested and convicted of Receiving and Concealing Stolen Property under \$100. The third robbery occurred at a party store in Romulus in August, 1995. A police officer identified defendant as the perpetrator on the store surveillance videotape.